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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 558

SOUTHERN RAILWAY COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY, AND STATE UNIVERSITY RAILROAD COMPANY, *Appellants.*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

JURISDICTIONAL STATEMENT

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October 17, 1957.

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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

JURISDICTIONAL STATEMENT

In compliance with Rules 13 and 15 of the Supreme Court of the United States, as revised, Southern Railway Company, Carolina and Northwestern Railway Company and State University Railroad Company, appellants, together sometimes referred to herein as Southern, submit their statement to show that the Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Western District of North Carolina is reported in 153 F. Supp. 57, and is attached as Appendix A. The decision of the Interstate Commerce Commission is reported in 299 I.C.C. 335, and is attached hereto as Appendix B.

The District Court entered no findings of fact or conclusions of law apart from its opinion.

JURISDICTION

This suit was brought by appellants under 28 U.S.C. 1336, to set aside an order of the Interstate Commerce Commission and trial was held before a three-judge Court convened under 28 U.S.C. 2284 and 2325.

The judgment of the District Court dismissing the complaint was entered on July 5, 1957, and notice of appeal was filed in that Court by appellants on August 30, 1957.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions, which are typical of numerous others to the same effect, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Thompson* v. *United States*, 343 U.S. 549, 554 (1952); *Dixie Carriers* v. *United States*, 351 U.S. 56, 58 (1956); *United States* v. *Baltimore & O. R. Co.*, 333 U.S. 169, 171 (1948).

QUESTIONS PRESENTED

The questions presented arise as a result of the decision of the Interstate Commerce Commission (Division 2) of November 15, 1956 (set forth in Appendix

B), reconsideration of which was denied by an order of the Commission, dated March 18, 1957. That decision was made following the complaint by certain railroads before the Commission in a proceeding in which appellants herein were defendants.

The Commission reached two main conclusions which are here brought into question.

I. Question as to existence of through routes. The Commission concluded that at the time of its decision "through routes" were in existence for the movement of *fine coal* from certain mines on the Louisville & Nashville Railroad Company, the Interstate Railroad Company, and the Norfolk and Western Railway Company, in the area including the southwestern part of Virginia and the eastern part of Kentucky and Tennessee, to various destinations on the lines of appellants in North Carolina and South Carolina. Such routes embraced as an intermediate carrier either the Clinchfield Railroad or the Georgia Railroad* and were found to be "through routes" for the reason that joint rates on *all sizes of coal* were published thereover (p. 337), although actually, as the Commission found, the routes were "closed" to the movement of fine coal on and after April 8, 1954, "as effectively as if schedules had been established with that sole objective" (p. 339).

The fact is that by tariffs effective April 8, 1954, appellants published, with the concurrence of the originating carriers above named, rates on *fine coal*** be-

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* The Georgia Railroad is not involved as to routes from mines on the Interstate Railroad and on the Norfolk and Western.

** As distinguished from "all sizes of coal" on which a higher level of rates applied.

tween the same origin and destination points just mentioned, the rates being restricted to apply over routes formed with such originating carriers but eliminating the Clinchfield and Georgia, thus preserving appellants' long-haul routes. The rates on fine coal thus published by appellants and restricted to apply only via their long-haul routes, were limited to *fine coal* (a specific description) and were 35 cents per ton less than the rates on *all sizes* of coal (a generic description) published over the routes embracing the Clinchfield or Georgia.

In concluding that the through routes were in existence, because of the availability of the generic description of joint rates in spite of its finding that such routes were actually closed, the Commission held that it was not restricted by the short hauling requirements of section 15(4) of the Interstate Commerce Act, and could, as it actually did, prescribe joint through rates over these routes on exactly the same level as the reduced rates over appellants' long-haul routes. The effect was to open the routes.

The Commission, in appellants' views reopened the routes on the theory that its action was beyond the reach of section 15(4). Appellants recognize that the restrictions in section 15(4) are applicable only where a through route is to be *established*, and therefore, if through routes are already in existence, section 15(4) is not applicable. If, however, as appellants believe, there were no already existing through routes via Clinchfield and Georgia, the Commission admittedly has not complied with section 15(4). This alone would render the order invalid.

The *first basic question* is how could the Commission, acting in conformity with law and facts, find that

"through routes" were actually in existence at the time of the decision via the Clinchfield and Georgia, when in reality the allegations and prayer of the complaints the undisputed facts and its own findings show that these routes were not intended to be used, were not in fact used, and were definitely "closed" as to the movement of fine coal thereover.

More particularly questions on this phase of the case are set forth in appellants' notice of appeal and are here relied upon. Condensed, they may be stated as follows:

(1) In concluding that "through routes" were in existence at the time of this decision and that it was thus relieved of complying with the restrictions in the short-hauling provisions of section 15(4) of the Act, did not the Commission misconstrue the law and violate the "holding out" and "course of conduct" tests recognized by this Court in *Thompson* v. *United States*, 343 U.S. 549, and *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956)?

(2) Could the Commission and the Court validly ignore the allegations and evidentiary showing that the Clinchfield and Georgia routes were in reality closed, and found to be "closed" whether or not described as "commercially" closed, and yet assume that through routes were in existence on the bare theory that "establishment of joint rates presupposes" such routes (p. 337); the joint rates actually not being usable or used for the movement of fine coal, not being used in the course of conduct of the carriers' business, not being in reality a holding out to transport this commodity, and not being the basis of solicitation for the movement thereof?

(3) Was it proper for the Court and the Commission to ignore the fact that complainant railroads before the Commission alleged in their complaint that the Clinchfield and Georgia routes were closed as the result of the restricted, reduced rates, concurred in by the originating carriers, and effective on April 8, 1954, and that the prayer of the complaint of those complainants requested the Commission to require under "section 15(3)" of the Act "the reinstatement" of the "routes eliminated by the action of the Southern Railway", thus admitting that the routes were not existing through routes but that establishment would be necessary in accordance with the provisions of section 15(3) and (4)?

(4) Was the lower Court justified in setting up an additional test not mentioned by the Commission and not required by statute, that even if the Clinchfield and Georgia routes were in practical effect closed, and intended to be closed to the movement of fine coal by the rates which became effective on April 8, 1954, after full opportunity for protest (with no protest) and for suspension (with no suspension), it would be necessary for appellants to show further a long-existing acquiescence implying "an abandonment by mutual consent, of these routes as joint routes" to negative their existence as through routes?

(5) Was the Commission's order which was based on the theory of existing through routes unlawful as not properly supported by findings or evidence in the record but instead contrary to established facts and the Commission's own findings, and, therefore, arbitrary and void in derogation of rights under the short-hauling provisions of the Act and in violation of the due process clause of the Fifth Amendment to the Constitution?

II. Question as to prescription of reasonable joint rates.

Serious questions arise as to the Commission's asserted rate-making powers even if, contrary to appellants' view, through routes via Clinchfield and Georgia be assumed. The correct answers to these questions, it is believed, warrant, for an additional reason, setting aside the Commission's order.

(1) Could the Commission in a broad-scale finding and order in respect to all of the alternate routes via the Clinchfield and Georgia from the points of origin to the points of destination here involved prescribe maximum reasonable rates on fine coal equal in every instance to those voluntarily established by appellants and their connections, without finding that the latter rates are reasonable maximum rates and afford a standard of reasonableness to be substituted for the existing higher rates prescribed by the Commission over the Clinchfield and Georgia routes?

(2) Did the Commission ignore the alternate character of the routes here involved and the long-established principle "that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate" (*McHenry-Millhouse Mfg. Co., Inc.* v. *N. Y., O. & W. Ry. Co., et al.*, 151 I.C.C. 501, 502)?

(3) Did the Commission misconstrue and erroneously rely upon section 15a(2) of the Act because, as it found, the "rates [prescribed] will produce more revenue if fixed at a lower rather than a higher level", thus disregarding the purpose of section 15a(2) to deal with the movement of all traffic from the same origin to the same destination, irrespective of the num-

ber of routes, and not to be applied where increase traffic over an open route would correspondingly reduc the movement of traffic over the other route?

(4) In determining the issue of unreasonableness did the Commission misconceive and misconstrue it rate-making powers and rely upon an improper basis intended to penalize applicants, on the theory that the "escaped the burden of proving that cancellation of th joint rates" over the Clinchfield or Georgia route "would be consistent with the public interest" unde section 15(3) of the Act, when the procedure followe by appellants and the concurring originating lines wa an entirely lawful one, in which the proposed reduce rates were filed with the Commission with full oppor tunity for opposing parties to protest and for the Com mission to object and suspend prior to their effectiv date on April 8, 1954, but without objection or sus pension?

(5) Did the Commission act without sufficient ev dence and without necessary findings, and, therefor arbitrarily in equalizing rates via the Clinchfield an Georgia routes, (a) without setting forth in its repor a single rate, representative or otherwise, (b) witho showing the extent of competition or why it woul justify lower rates than those previously prescribe over the Clinchfield and Georgia routes, (c) witho any real comparison with the greater number of line involved via the Clinchfield and Georgia routes or th highly-efficient intermediate yards of appellants, (d without reference to, or facts showing cost-of-tran portation, (e) without proper conception of group r lationships, and (f) without consideration of the fa tha there was no shipper support whatever for th rates prescribed from Norfolk and Western mines ar

from Interstate mines and only insignificant support for the rates from the Louisville & Nashville mines?

(6) Having found that the assailed rates (on coal of all kinds) were and are on a level prescribed by it as maximum just and reasonable rates (270 I.C.C. 291), was not the absence of any finding that such prescribed rates were not a proper basis for the rates on fine coal ordered over the closed routes a fatal omission, particularly in the absence of a finding that the rates to which equalization was required were reasonable maximum rates?

STATUTE INVOLVED

The sections of the Interstate Commerce Act pertinent here are section 1(4) (49 U.S.C. 1(4)) with respect to the duty of common carriers by railroad to establish reasonable through routes, section 15(3) vesting the Commission with power to require the establishment of through routes and joint rates, section 15(4) providing for protection against short-hauling, section 15(7) authorizing the Commission to suspend tariffs prior to their effective dates, and section 15a(2) setting forth various factors to be considered by the Commission in prescribing rates. Pertinent portions of these sections are set forth in Appendix C attached hereto.

For convenience the limitations on the Commission's power to prescribe through routes, as set forth in section 15(4), are here quoted:

> "Sec. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such

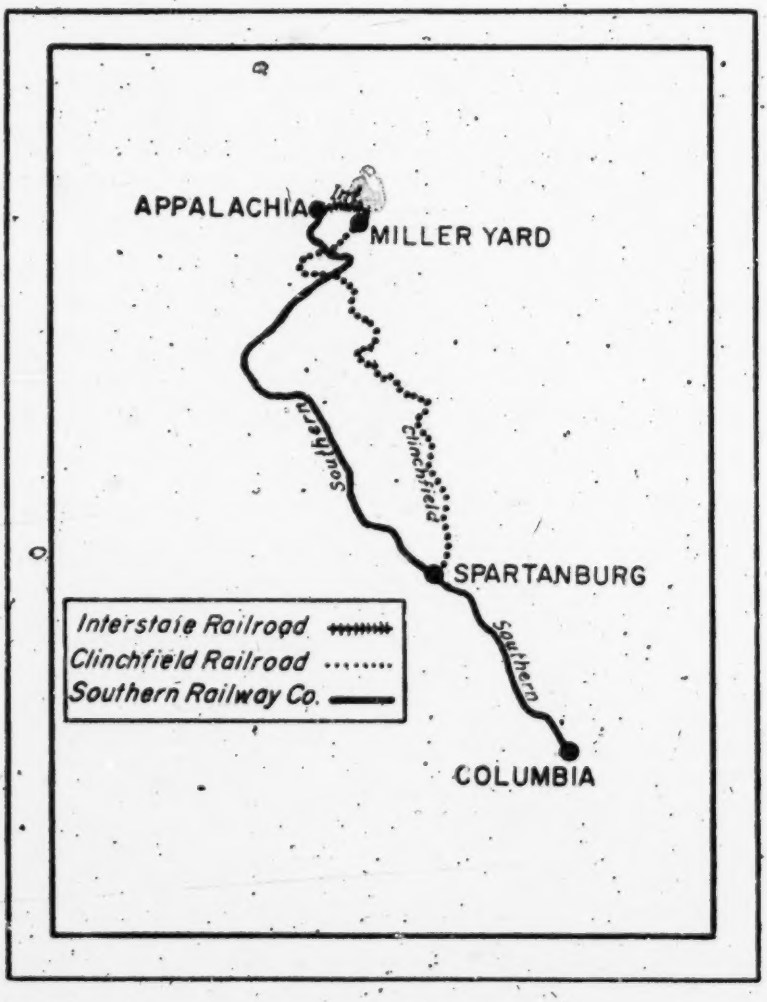
route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through routes unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

STATEMENT

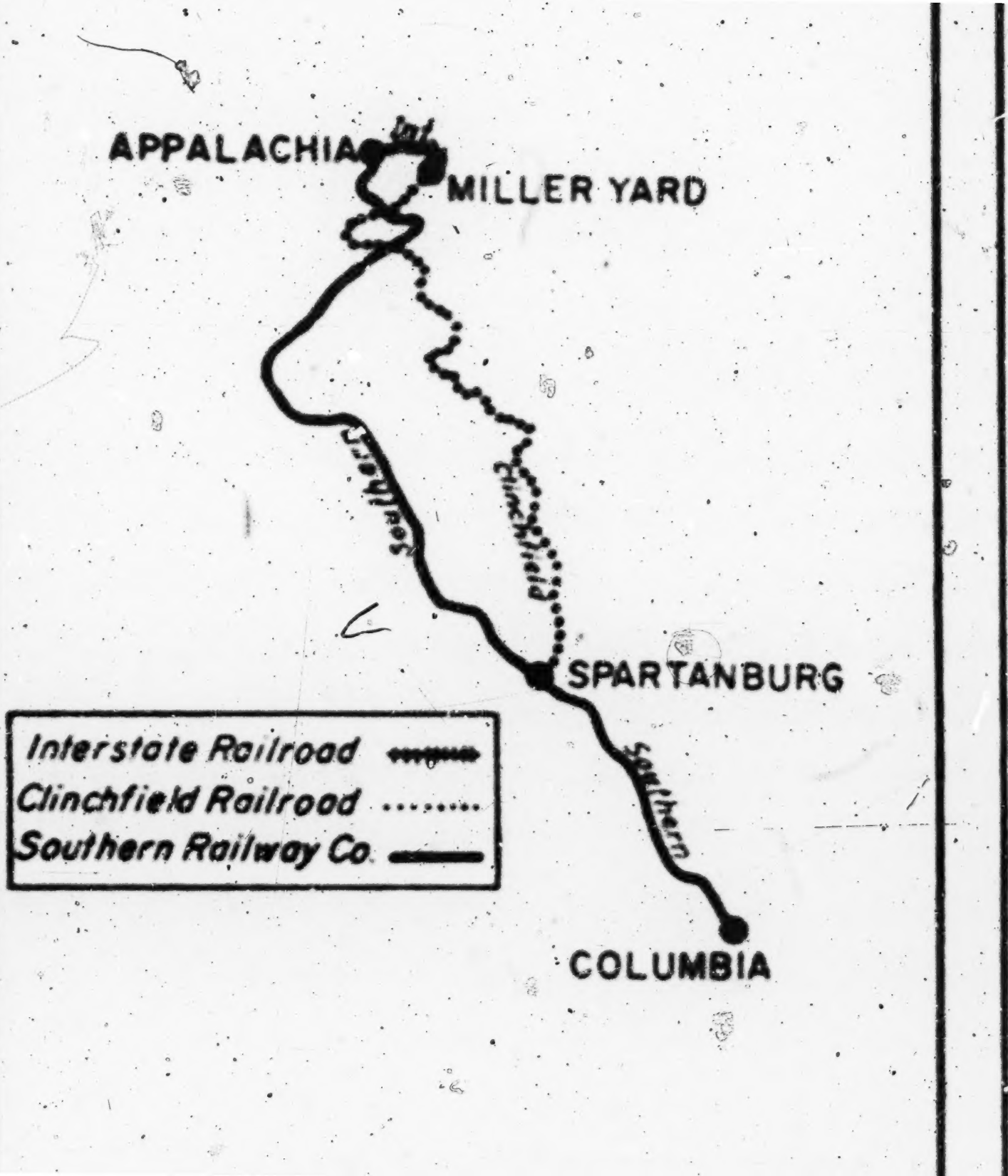
I. SHORT-HAULING PROVISIONS OF THE ACT ARE MISCONSTRUED AND MISAPPLIED.

As previously indicated, the routes here involved are from mines on three railroads, the Louisville & Nashville, the Interstate, and the Norfolk and Western, to various points on appellants' lines in North Carolina and South Carolina. The following diagram indicating the routes from Interstate mines, which are important origin points, to Columbia, S. C., a representative destination, is illustrative of the physical situation presented not only as to origin points on the Interstate

but as to the routes, though different and varying more in distance, from the mines on the other two originating railroads:



It will be noticed from this diagram that the Southern's long-haul route is from its connection with the Interstate at Appalachia, Va., all the way to Columbia, S. C. This is the route over which appellants with the concurrence of Interstate, published on April 8, 1954, a reduced rate on *fine coal*. The reduced rate is specifically restricted in the tariff to apply via this route.


APPALACHIA
MILLER YARD
SPARTANBURG
COLUMBIA
Interstate Railroad
Clinchfield Railroad
Southern Railway Co.

It will further be observed from the diagram that the other route from mines on the Interstate (with the higher rate applicable to *all sizes of coal*) is via Miller Yard where connection is made with the Clinchfield. This route extends southward to Spartanburg where it connects with appellants' line extending to Columbia. It can be seen immediately that via the Clinchfield route the Southern would be drastically short-hauled, since instead of the haul from Appalachia to Columbia (342.9 miles) it would have only 28.5 per cent of that haul, namely, 97.8 miles from Spartanburg to Columbia (R. 246, Ex. 26).

Prior to April 8, 1954, when the reduced rate on fine coal became effective via Southern's long haul route, rates on all sizes of coal, in accordance with maximum rate orders of the Commission in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I.C.C. 291, plus subsequently authorized general increases (report p. 337), applied from the mines over both routes to Columbia. Effective April 8, 1954, the rate on fine coal via appellants' long-haul route became, as noted above, 35 cents less than the rate on all sizes of coal via the Clinchfield route.

April 8, 1954, tariff, not suspended. Appellants' reduced rates on fine coal, concurred in by Interstate,* were filed in appropriate tariffs with the Commission to become effective on April 8, 1954, on statutory notice, namely 30 days, prior to the effective date. Appellants' purpose was to protect their revenues and maintain efficient and economical routes (R. 247). Section 15(7) of the Act vests the Commission with power to suspend, upon protest, or on its own motion,

* Interstate is here used as illustrative but the same situation is true as to the rates from mines on the other railroads.

proposed rates which have not become effective. Thus carriers and shippers had full opportunity under the statute to protest the reduced rate via Southern's long-haul route from the mines on the Interstate to Columbia but did not do so. Nor did the Commission in the exercise of its power to act on its own motion object to the proposed rate or suspend it. Therefore, the reduced rate with the routing restriction became effective on April 8, 1954, as a valid and lawful rate, and as firmly established as if it had been in existence forever.

These facts are cited because the Court and the Commission, it is believed, erroneously misconceived the effect of the reduced rate in the present illustration and the other reduced rates here involved, together with the clear-cut restriction in routing provided as to each such rate. Restricted routes on coal are not uncommon. For example, shippers can use only Louisville & Nashville routes from mines on this line to Cincinnati, O., and Louisville, Ky., and to Atlanta, Ga. (R. 153, 178, 180).

It is to be noted that the complaint was not filed with the Commission until August 29, 1955, more than a year and four months after the reduced rates became effective.

The lower Court's theory. Although stating earlier in its opinion that "Appropriate tariff schedules were filed and the reduced rate on fine coal became effective on April 8, 1954, restricted, however, to those routes on which the Southern had its longest haul", the Court, directly contradicting the evidence of record, and reaching its conclusion adverse to appellants said, among other things (Appendix A, p. 6a):

> "Nothing occurred on April 8, 1954, to change their character as through routes. The tariffs establishing joint rates over them remained in ef-

fect. The publication of lower rates over competing routes diverted traffic from them, but there has been no such acquiescence over an extended period of time as would imply an abandonment, by mutual agreement, of these routes as joint routes.

It would be anomalous, indeed, if a railroad, seeking the closure of a joint route, by establishing a lower rate on a competing route, could relieve itself of the burden of proof imposed upon it and transfer to the other participating carriers in the joint route the heavy burden of meeting the requirements of section 15(4) of the Act."

It was plain from the proposed restricted reduced rates over Southern's long haul-routes that the alternate routes via the Clinchfield or Georgia would be effectually closed to the movement of fine coal. Nevertheless, neither the participating originating carriers in such rates nor any other carriers or shippers protested the rates, as to which burden of proof would be on appellants, and no effort was made to have the rates suspended, and they were not suspended.

The fact is that on April 8, 1954, the routes applicable on fine sizes of coal via Clinchfield or Georgia were intended to be closed as indicated by the lower rates and routing restrictions, and were actually closed to the movement of fine coal. The Commission itself found in its decision of November 15, 1956, more than two years after the reduced rates became effective on April 8, 1954 (p. 337):

"As a consequence of the reduction, fine coal from the origin groups under consideration, except for a few shipments made by mistake, *has not been moving* over routes including the lines of the Clinchfield or the Georgia Railroad". (Emphasis supplied)

The Commission further found that appellants' action" in concurring in the rate reduction—

> "* * * *closed* to traffic the higher rated routes as effectively as if schedules had been established with that sole objective". (p. 339). (Emphasis supplied).

The complainant railroads before the Commission intervening defendants in the lower Court) clearly ecognized in their complaint filed with the Commis- ion that the routes via the Clinchfield or Georgia were losed and that an order under section 15(3), which vould necessarily be subject to the short-hauling limi- ations in section 15(4), would be required to open uch routes. The prayer of their complaint reads:

> "WHEREFORE, complainants further pray that the Interstate Commerce Commission, under the power inferred [sic] upon it in *Section 15(3)* of the Interstate Commerce Act, require defendants [Southern] to answer the charges herein; that after due hearing and investigation an order be made requiring the *reinstatement* of the Clinch- field Railroad, Georgia Railroad, and Seaboard Air Line Railroad* routes *eliminated* by the action of the Southern Railway". (Emphasis sup- plied)

The evidence unmistakably shows, as the Commis- ion found, that the routes via the Clinchfield or eorgia were closed to the movement of fine coal. (See pposing railroad testimony that the Clinchfield and eorgia routes "were closed", were "commercially losed", were "made unavailable" and were "discon- nued" (Witness Roby, R. 99, 104 118, 187, 188, 195, nd Ex. 20, Column 1).

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* By an amendment of the complaint Seaboard was eliminated in e case before the Commission.

Believing that statutory provisions should have a common-sense construction and be interpreted in the light of realities, appellants' view is that the lower Court mistakenly overlooked the fact that the Clinchfield and Georgia routes were actually closed on April 8, 1954, and that it is beside the point to speak of a need, as the lower Court seemed to think, for additional evidence that would "imply an abandonment, by mutual agreement, of these routes as joint routes" to justify finding them closed, particularly since the law places the burden on complainants to establish the unlawfulness of the assailed rates. This is believed to be a basic error of the lower Court in the interpretation of the statute.

Statutory tests recognized in the Thompson case, ignored. A curious circumstance is that the lower Court did not even mention the landmark case of *Thompson* v. *United States*, 343 U.S. 549, supra, which was heavily relied upon by appellants. In that case the question was whether the Commission could treat as existing through routes the line of the Missouri Pacific from various origin points, including Lenora, Kans., to Concordia, Kans., and thence the line of the Burlington to Omaha, Nebr., when the Missouri Pacific had a longer single-line route via Concordia to Omaha, the single-line route from Lenora to Omaha being one-third longer than the two-line route (278 I.C.C. p. 520). The rate on the commodity involved (grain), from Lenora to Omaha was a combination rate totaling 30 cents per 100 pounds via the Missouri Pacific to Concordia and the Burlington beyond. In contrast the single-line route of the Missouri Pacific had a rate of 25.5 cents. This Court held that whether the route via the Missouri Pacific and the Burlington was an *existing*

through route, relieving the Commission of the short-hauling restrictions in section 15(4), depended on certain tests which it held had not been met, and therefore, struck down the Commission's order.

The Court there said (p. 557):

> "In short, the test of the existence of a 'through route' is whether the participating carriers *hold themselves out* as offering through transportation service. *Through carriage* implies the existence of a through route whatever the form of the rates charged for the through service.
>
> "In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' *course of business* negatives the existence of any such through route.
>
> * * *
>
> Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4) [p. 559]." (Emphasis supplied)

In holding that the Commission had misconstrued the statute and that the evidence did not support the Commission's finding that a through route existed the Court said (pp. 560-561):

> "We hold that the Commission's efforts to support its finding that a through route from Lenora to Omaha via the Burlington line already exists are inconsistent with the meaning of the term 'through route' as used in the Interstate Commerce Act. Since there is admittedly no evidence that the Missouri Pacific ever offered through trans-

portation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route."

The Court thus in construing the statute set forth a realistic and practicable test which should be applied here, namely, whether the carriers in the Clinchfield and Georgia routes "hold themselves out as offering through transportation service" over such routes as indicated by their "course of business" in respect to the traffic involved*.

The record is utterly devoid of any evidence or contention that any fine coal shipments were *solicited* via the Clinchfield or Georgia routes. The publication of the reduced rates, with restricted routing, put the public on notice that as distinguished from rates applying on all sizes of coal as a general description, specific rates on fine coal on a lower level would be available via Southern's long-haul routes and not via the Clinchfield and Georgia routes. As previously pointed out, the "course of business" of the carriers and also of the shippers was that, except for a few shipments by mistake, there was no movement of fine coal via the Clinchfield and Georgia routes, and those routes were "closed" to the actual movement of fine coal.

Appellants believe that the lower Court in ignoring these tests failed properly to construe the statute in question.

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* This is the interpretation by the Commission itself of the test of the Court in the *Thompson case* as set forth in *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611, 616. This decision was sustained by the Supreme Court in *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956).

Certainly the fact that lump coal or sizes other than fine coal may continue to move via the Clinchfield and Georgia routes is of no significance, as was the through transportation over the Missouri Pacific-Burlington route to points short of Omaha. Moreover, the fact that fine coal within the generic classification of all sizes of coal, might have moved in quantity over the Clinchfield and Georgia routes prior to April 8, 1954, is, appellants believe, of no legal or factual significance and the lower Court's view to the contrary is error.

D. & R. G. W. case and certain other Supreme Court cases misapplied. In *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321, this Court upheld the decision of the Commission in which the D&RGW contended that its lines were included in existing through routes in connection with the Union Pacific and that the Commission was, therefore, not bound by the restrictions in section 15(4). The Commission found against this contention and was sustained by the Supreme Court. The Commission in its decision (287 I.C.C. 611), as previously indicated, quoted from the *Thompson case, supra*, as to the tests to apply and said (p. 616):

> "It thus becomes necessary to determine whether the carriers in this proceeding 'hold themselves out as offering through transportation service' from and to the points here concerned via the Ogden gateway as indicated by their 'course of business' in respect of traffic over the routes in question."

This Court in reviewing the Commission's order said that in its opinion the finding of the Commission as to absence of solicitation of traffic over the Rio Grande route by which the higher-combination rate applied and its finding as to the "carriers' course of

business" were supported by the record. Part of the quotation from the Commission's decision is as follows (p. 330):

> " 'The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic'. 287 I.C.C. at 618."

The Court then said (p. 330):

> "We adhere to the 'holding out' test of the Thompson case. The evidence before the Commission was not such as to compel it to find that the Union Pacific held itself out as offering through service over the Rio Grande lines."

The lower Court in the present case made no mention of the holding-out test as applied by the Commission in that case, but apparently considered as controlling many years of disuse of the D. & R. G. W. routes, saying that the routes were held to be "technically closed as through routes where it appeared that joint rates had been cancelled more than forty years previously and over which in the last forty years shipments could move only at much higher combination rates" (Appendix A, p. 6a).

While the lower Court recognizes that the reference in the Supreme Court decision to the history of the rates was only "one" of the circumstances referred to, it appears that it was an extremely minor one and that the findings of the Commission quoted by the Court were the real basis for sustaining the order.

It is to be remembered that the Court in that case approved the prior statement in the *Thompson case* as to the importance of compliance with section 15(4) saying (p. 327):

> "We there emphasized the purpose of section 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunk line 'short-hauls' without faithful observance of restrictive conditions imposed by that section."

It is true that in the *Thompson case* and the *Denver & Rio Grande Western case,* the rates over the routes in question were combination rates, while in the present case the rates are joint rates on all sizes of coal. The mere fact that the latter rates are joint rates is not controlling, and the lower Court although saying that "the existence of a joint rate necessarily presupposes the existence of a through route" (citing *United States* v. *Great Northern Railway Co.,* 343 U.S. 562) nevertheless found it necessary to rely upon other reasons to support the Commission's order. The *Thompson case,* itself, by its holding that "whatever the form of the rates charged for through service" through routes are implied by actual carriage (343 U.S. p. 557), clearly indicates that the form of rates is not controlling and that the Commission's theory of presupposition is erroneous.

It would seem strange indeed if the existence of joint rates meant through routes as a matter of law, because, as is well known, joint class rates applying to a generic description of traffic and usually on a high level are published without routing restrictions and therefore apply over nearly every railroad route in the country. It seems utterly unreasonable, for example, that an alternate route having a high joint class rate as compared with the long-haul route of the carrier with a low commodity rate should be considered an existing through route, as a matter of law, where over the

former route the only rate applicable to the commodit in question would be a high joint class rate with n movement of the commodity thereunder.

Class rates are either local or joint, short-mileag rates applying to certain classes of commodities accord ing to their recognized characteristics, as for exampl first-class rates (class 100) applicable to commoditie classified within the first class, other classes being per centages of first class. The rates apply without rout restriction throughout almost the entire United State Hundreds of routes between the same origin and dest nation points under joint rates may be available. I "the vast territory * * * involved", the Commission ha said "there are literally millions of routes" *Class Rate in the United States,* 294 I.C.C. 662, 666.

A commodity, as for example, lithium ore, may b given a low commodity rate by a carrier over a re stricted route between certain points. The same com modity being classified in a certain class would b covered by *joint* class rates over numerous other route which would be unusable or closed because of the highe class rates. To establish such commodity rate, th carrier would have to file a tariff with the Commissio which, on good cause shown, could be suspended by th Commission prior to its effective date. If not sus pended, it would become effective.

To hold under such conditions that the Commissio after the effective date of the commodity rate, coul open all the routes over which joint class rates wer published by assuming to exercise its rate-makin power so as to require the same rates on the specif commodity over those routes as over the restricte routes would run directly counter to the short-haulin provisions of section 15(4) and prevent meritoriou

reductions in the interest of shippers and the public. On the other hand, the joint class rates having general application could not be cancelled by the carrier publishing the commodity rate. This is true in the present case as to the general purpose rates applicable to all sizes of coal, and prescribed by the Commission in the *Carolina Coal Consumers case,* 270 I.C.C 291, *supra.* Compare *Seaboard Air Line Ry.* v. *Carolina & Northwestern R. Co.,* 194 I.C.C. 183. The mere existence of joint class rates over those routes does not mean that the routes could be treated as existing routes within the short-hauling provisions of section 15(4) of the Act.

The Commission by its approach has in substance emasculated the meaning of the short-hauling provisions of section 15(4). Congressional intent and the salutary purposes of the statute protecting a carrier's common-law right to its long haul have been defeated. Indeed, if this unique theory that the joint rates presuppose through routes is sustained, section 15(4) has largely been written off the statute books by the very agency which the law was designed to restrain from arbitrary action. This would be another "unwarranted distortion of the statutory pattern" similar to the abortive effort of the Commission in the *Thompson case,* where this Court said:

> "* * * the logical conclusion of the theory advanced by the Commission is that through routes exist between all points throughout the country wherever physical rail connections are available." (343 U.S. p. 559)

The joint-rate presupposition theory as to through routes coupled with the "joint-rate" nature of class rates would likewise result in the conclusion that "through routes exist between all points throughout the country * * * ".

Here it is to be remembered that the rate over the Clinchfield and Georgia routes is on all sizes of coal, while the rate over appellants' long-haul routes is specifically on fine coal and clearly restricted to these routes. The public is put on notice of the difference.

Cases cited by the Court not in point. As to the *Great Northern Railway Co. case,* 343 U.S. 562, (1952), cited by the lower Court, the question was whether—

> "the Commission has power to establish joint rates for the purpose of assisting a [20-mile, stub-end rail] carrier to meet its financial needs" (p. 564).

The Court said that—:

> "the through routes in question already exist since the carriers concerned have continuously provided through service over the same through routes at a combination of separately established rates".

The Commission's order requiring joint rates over already existing through routes and prescribing divisions thereof was held not to be prohibited by the weak-carrier provisions of section 15(4). The Court made plain that in that case, unlike the situation here, there were no alternate rail lines and no *short-hauling* problem was involved.* There is no holding, appellants believe, that the mere existence of joint rates necessarily means the existence of through routes over which the rates apply. In the present case, regardless

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* The Court said, page 570:

> "Since existence of a short-hauling problem presupposes the existence of alternate rail connections, such a problem cannot arise in this case where the Montana Western [the short line] is the only carrier serving Valier [on the short line]."

of the joint rates on all sizes of coal, those rates in any realistic sense, are not used or usable in actual practice and the routes are actually closed.

The *Virginian Railway Company case,* 272 U.S. 658, cited by the lower Court, did not involve alternate rail lines but did involve unlawful discrimination. It was held not controlling in the *Thompson case,* footnote 18 at p. 560, and is not controlling here. The *Great Northern Ry. case,* 81 F. Supp. 921, affirmed 336 U.S. 933, also cited by the lower Court, related to an order requiring transit and it was held that a through route "is not created by creating a transit" (p. 925). The case is not in point.

For reasons outlined above appellants believe that the decision of the lower Court is erroneous, that it should be reversed, and that the questions presented are important ones for consideration by this Court.

II. CONTRAVENTION OF STATUTORY STANDARDS WITH RESPECT TO PRESCRIPTION OF REDUCED JOINT RATES ON FINE COAL.

Aside from errors believed to exist with respect to the lower Court's holding that through routes are in existence, there is further error, appellants believe, in the departure from statutory standards in finding rates via the Clinchfield and Georgia routes to be unreasonable maximum rates on fine coal and requiring equalization of such rates with those voluntarily established by appellants and their connections over appellants' long-haul routes.

The lower Court cites relative distances, car-mile revenues, different treatment given the Chesapeake & Ohio Railway mines, and the need for reducing the rates to move traffic as sufficient to justify the

Commission's findings on this phase of the case (Appendix A, pp. 7a, 8a).

While recognizing the broad discretion which the Commission has in determining reasonableness of rates, this agency is nevertheless subject to certain requirements under the statute, and it is believed that these have unjustifiably been departed from.

Reasonable standard of comparison not found. In spite of the fact that the rates on all sizes of coal via the Clinchfield and Georgia routes are those prescribed by the Commission in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I.C.C. 291, plus subsequently authorized general increases (report, p. 337), the Commission in the present case finds that rates on fine coal over the closed routes must be 35 cents less than those prescribed rates and must not exceed the rates voluntarily established by appellants and their connections via appellants' long-haul routes. The prescribed rates are related to appellants' reduced rates, just as if this were a discrimination case, when in fact there has been no allegation or finding of unlawful discrimination under the Act.

A well-established principle is that, in the absence of unlawful discrimination which is not here involved, there is a zone of reasonableness within the managerial discretion of the carriers and they may voluntarily establish rates which are lower than reasonable maximum rates but which the Commission itself may not require. For example, in *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394, affirmed by the Supreme Court per curiam, 342 U.S. 890 (1951), the Court said, in holding an order of the Commission to be void (p. 398):

"The primary position taken by plaintiff railroads is that carriers are free to adjust their rates to meet competition, so long as the adjusted rates are within the 'zone of reasonableness' and result in no undue prejudice or preference or discrimination prohibited by the statute. While the Commission has in its brief made an extended argument attacking this position, we think the plaintiffs' statement of the principle is sound and is adequately supported by authority. United States v. Chicago M., St. P. & Pac. Railroad Co., 1935, 294 U.S. 499, 506, 55 S. Ct. 462, 79 L. Ed. 1023; Texas & Pac. Ry. Co. v. United States, 1933, 289 U.S. 627, 635-37, 53 S. Ct. 768, 77 L. Ed. 1410."

The Court held that basic findings are necessary to sustain an order of the Commission, citing Supreme Court cases, p. 400, 401, 405, and that these had not been made.

These principles, it is believed, have been departed from in the present case, particularly where alternate routes are involved, as here. Because a carrier within the zone of reasonableness elects to reduce its rates via its longer-haul routes, does this means that it will automatically be subject to the penalty of having to reduce rates over alternate routes to the same level?

Here it is believed that the Commission has made such requirement, without finding that the reduced rates over appellants' longer-haul routes constitute reasonable maximum rates and afford a standard of reasonableness to be substituted for the existing higher rates prescribed by the Commission over the Clinchfield and Georgia routes which higher rates were and still are unchanged as maximum reasonable rates. (See finding as to rates prescribed in Carolina Coal Consumers case, at p. 337 of the Commission's report.)

Although the lower Court in the present case relies upon *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, supra, the fact is that in that case the Commission had expressly found (98 I.C.C. 488, 496) that the compared rates "afford a standard of reasonableness".

No finding that departure from the rates prescribed in 270 I.C.C. 291 is justified. The Commission in 299 I.C.C. p. 337, made this factual finding:

> "Except for the reduced rates on fine coal, the rates referred to are on the level prescribed in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.,* 270 I.C.C. 291, plus subsequently authorized general increases."

This means that the assailed rates over the closed routes were not and are not found in excess of a level prescribed as lawful rates by the Commission. Notwithstanding this factual finding, there is complete absence of any finding that the rates thus prescribed as maximum just and reasonable rates could be departed from in ordering the reduced rates on fine coal over those routes. This was a fatal omission, particularly in the absence of a finding that the rates to which equalization was required could be considered as reasonable maximum rates.

This Court in a number of cases has pointed out the necessity of adequate findings by the Commission to support its ultimate conclusions, if its orders are to be sustained as valid. See, for example, *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 583 (1947); *State of Florida* v. *United States,* 282 U.S. 194; *United States* v. *Baltimore & Ohio R. Co.,* 293 U.S. 454; *Atchison, Topeka & Santa Fe R. Co.* v. *United States,* 295 U.S. 193; *United States* v. *Carolina*

Freight Carriers Corporation, 315 U.S. 475; *City of Yonkers* v. *United States*, 320 U.S. 685; *Eastern-Central Motor Carriers Association* v. *United States*, 321 U.S. 194; *State of North Carolina* v. *United States*, 325 U.S. 507; and *State of Alabama* v. *United States*, 325 U.S. 535.

Rule as to alternate routes. The Commission is believed further to have departed from the well-established principle with respect to prescribing rates over alternate routes. The Commission said, for example, in *McHenry-Millhouse Mfg. Co.* v. *N. Y. O. & W. Ry. Co., et al.*, 151 I.C.C. 501, 502, supra,

> "We have repeatedly said that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate."

This would mean, of course, that a mere comparison of distances, or earnings per mile, as resorted to by the Commission in the present case, would not be significant, because, in substance, it would be merely a comparison of rates over the two routes.

Section 15a(2). The Commission in support of its decision of unreasonableness states (p. 339):

> "Where there is before us clear and convincing evidence that rates will produce more revenue if fixed at a lower rather than a higher level, we may take that fact into consideration in prescribing a maximum reasonable basis, for we are enjoined by the so-called ratemaking rule of section 15a(2) of the act to give consideration to the 'effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed.'"

Such reasoning is based on a misconstruction of the statute, which is believed to be a fatal error. Section 15a has reference to all traffic from a point of origin to a destination, irrespective of the routes taken. It is concerned with whether the shippers, taking into account cost at origin plus the transportation charge, can compete in the market at destination and thus have their traffic moved. Here traffic can move freely over open routes, and the total volume from origin to destination would not be increased by opening the Clinchfield and Georgia routes, but the effect would be to take traffic away from appellants' long-haul routes to the extent of the increase in volume of the open routes. There would be merely a "resulting rearrangement in the movement of rail traffic". Compare *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562, 751.

Reduced rates effective April 8, 1954, without suspension. The Commission has relied upon an improper factor, it is believed, in apparently assuming that appellants should be penalized by an unreasonableness finding, because, as the Commission said, they "escape the burden of proving that cancellation of the joint rates" over the Clinchfield or Georgia routes "would be consistent with the public interest" under section 15(3) of the Act. The fatal flaw in this reasoning is that the procedure which appellants and the concurring originating lines followed was an entirely lawful and proper one. The proposed reduced rates were filed with the Commission with full opportunity for protest and suspension and became effective on April 8, 1954, without objection or suspension. Such procedure is in accord with procedure recognized by the Commission as proper in other cases. See, for example, *Cement from the South to Jacksonville*, 292

I.C.C. 397, involving restricted routing in connection with reduced rates on cement. In case of suspension, the burden would have been on applicants. When there was no suspension and when the rates became effective on April 8, 1954, the burden then rested on those objecting to the rates. Those who objected to the closing of the Clinchfield and Georgia routes considered it inexpedient to protest or object before the reduced rates with restrictions became effective, but this is no valid reason for ignoring the legal effect of the rates and restrictions thus established or for making the unreasonableness finding here involved. As previously noted, the complaint before the Commission was not filed until over a year and four months after the rates became effective and the restrictions became operative.

Absence of shipper support. The Commission makes no mention of the fact that there was no testimony whatever by any shippers or receivers of coal from mines on the Interstate Railroad and Norfolk and Western in support of opening through routes via the Clinchfield or Georgia or of reducing the rates thereover. The shipper testimony as to shipments from mines on the third originating carrier, the Louisville & Nashville, was extremely general, indefinite, and lacking in significance. For example, the principal witness, appearing for the Harlan County Operators, said as to the proposed Clinchfield route that he relied upon emergency conditions such as strikes, washouts, and landslides (R. 145, 146) and said "To me it is strictly a safety valve proposition". He further said as to the existing Southern Railway route "In fact, I like it. I have no intention, even if the route is restored, of trying to get any coal routed over the other way" (R. 156).

Other short cuts undermining ultimate conclusions. There was not even a semblance of cost showing in support of the Commission's unreasonableness finding. There is no comparison in the report of the multiple routes involved via the Clinchfield and Georgia with appellants' reduced-rate routes and no mention of appellants' highly efficient intermediate yards. There was apparently no consideration given to the principle that rates reduced to meet water, truck, or oil competition must be clearly justified. For example, in *Whatcom County Traf. & Rates Bur.* v. *C., M., St. P. & P. R. Co.*, 287 I.C.C. 442, 443, the Commission said that the compared "rates, having been reduced in order to meet the competition of substitute fuels to a level lower than that established on October 16, 1923, in accordance with our findings in *Western Coal Rates*, 80 I.C.C. 383, are depressed and do not represent a valid test of reasonableness". See also *International Minerals & Metals Corp.* v. *Southern Pac. Co.*, 279 I.C.C. 617, 620. Disturbance in the grouping of mines was erroneously assumed when, in fact, the mines continued to be related exactly as they were before appellants' reduced rates and restricted routes became effective, and the shippers could continue to ship in accord with such relationships over those routes. There was nothing to show that the routes from the Chesapeake & Ohio Railway mines, with the Clinchfield a necessary link, were properly comparable or in any way controlling. The complaint did not involve such mines.

The above, among other reasons, it is believed, show that the ultimate unreasonableness findings by the Commission, in addition to those as to through routes, are not justified by necessary supporting findings or evidence and that the Commission's order is invalid.

QUESTIONS ARE SUBSTANTIAL AND IMPORTANT

Appellants believe that the Commission and the Court have erroneously construed the Interstate Commerce Act, have disregarded and misapplied statutory standards for determining existing through routes, have run counter to principles established by decisions of this Court, and have without authority of law and without necessary findings and supporting evidence stripped appellants of their right to benefit from their long hauls in through routes as provided for in section 15(4) of the Act. The case relates to a large movement of traffic, and the adverse decision here appealed from, if sustained, would mean serious injury to appellants.

If the Commission's theory as to the necessary effect of joint rates as establishing the existence of through routes, regardless of evidence as to the non-usability of such routes, should be accepted as a general principle, it would virtually make a shambles of the short-hauling provisions of section 15(4) of the Act, and discourage, if not bar, numerous meritorious reductions in rates of benefit to shippers and the public.

Even if contrary to what appellants believe to be the law, the order should not be declared to be invalid because of the erroneous theory of the Commission and the lower Court as to existing "through routes", it is, nevertheless, believed to be invalid because of the misapplication of the Commission's powers under the Act in prescribing an equality of rates without lawful authority, without complying with statutory standards, and without the necessary findings and evidence to support the order.

The serious spectacle is presented of another attempt improperly to whittle away the important rights of carriers to benefit from routes in which they have the long haul. The right to such long haul is emphasized in the *Thompson case,* supra. In the light of the legislative history set forth therein, the following somewhat sharp statement appears appropriate here:

> " * * * the latter's [Commission's] persistence in recommending repeal of section 15(4) has been matched and overborne by the persistence of Congress in retaining it. Congress has emphatically made clear that in its view the national interest requires the protection of railroads against being short-hauled. Encouragement should not be given to disregard of that policy * * *. If the requisite findings or conclusions are ambiguous or unclear, or the policy of the section is slighted, our duty demands remand to the Commission to dispel ambiguity or to secure clarity and obedience to the policy.*

Aside from the questions under section 15(4), it appears that blanket treatment has been given and short cuts taken in respect to the finding of unreasonableness of the rates here involved in such manner as to constitute action beyond the Commission's authority.

In view of the contentions made by the Commission and by the United States as to the meaning of section 15(4) of the Act and the interpretation to be made of the *Thompson case* and *Denver & Rio Grande West. case,* it is believed important to have the questions finally decided. Such clarification is desirable in the interest of carriers, shippers, and the public at large.

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* Dissenting opinion of Mr. Justice Frankfurter in *Denver & Rio Grande West. R. Co. case,* 351 U.S. 321, 336-337, supra.

It is not to be overlooked that the Commission has not purported to be governed at all by the short-hauling provisions of section 15(4) and that in equity if it should act in accordance therewith there is full power to protect the public interest. The Commission can require carriers to short-haul themselves upon findings, not attempted here, that their routes "are unreasonably long" or that the proposed through routes are "needed in order to provide adequate, or more efficient or more economic transportation". Also, the Commission could proceed by proper findings not present here, to exercise its rate-making authority under the Act if contrary to appellants' view, through routes should be held to be in existence.

Appellants respectfully submit, therefore, that jurisdiction of this case on appeal is fully shown by the above, that the questions presented by this appeal are substantial and of vital public importance, that the case should be heard by the Court in briefs and oral argument, that the judgment of the lower Court should be reversed, and that the Commission's order should be set aside.

Respectfully submitted,

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For Appellants.

October 17, 1957.

PROOF OF SERVICE

I, R. Granville Curry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of October, 1957, I served copies of the foregoing statement on the several parties hereto, as follows:

(1) On the United States, by mailing a copy in a duly addressed envelope, with first-class mail postage prepaid, to—

The Solicitor General,
Department of Justice,
Washington 25, D. C.

Victor R. Hansen, Esq.,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

James E. Kilday, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

Charles R. Esherick, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

and by mailing a copy in a duly addressed envelope, with airmail postage prepaid to—

James M. Baley, Jr., Esq.,
United States Attorney,
United States Court House,
Asheville, N. C.

(2) On the Interstate Commerce Commission by mailing copies duly addressed with first-class postage prepaid to—

Robert W. Ginnane, Esq.,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

B. Franklin Taylor, Jr., Esq.,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

(3) On intervening defendants by mailing copies duly addressed with air-mail postage prepaid to their respective attorneys of record as follows—

A. K. McIntyre, Esq.,
Clinchfield Railroad,
Erwin, Tenn.

R. B. Gwathmey, Esq.,
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James W. Hoeland, Esq.,
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Louisville, Ky.

.....

R. GRANVILLE CURRY

APPENDIX A

SOUTHERN RAILWAY COMPANY, ET AL., *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, ET AL., *Defendants*.

Civ. A. No. 1253.

United States District Court
W. D. North Carolina,
at Charlotte.

July 8, 1957.

John M. Robinson, Charlotte, N. C., W. T. Joyner, Raleigh, N. C., Arthur J. Dixon, Henry J. Karison and R. Granville Curry, Washington, D. C., for plaintiffs.

Victor R. Hansen, Asst. Atty. Gen., James M. Baley, Jr., U. S. Atty., Asheville, N. C., James E. Kilday and Charles R. Esherick, Attys., Dept. of Justice, Washington, D. C., for defendant United States.

Robert W. Ginnane, Gen. Counsel, B. Franklin Taylor Jr., Asst. Gen. Counsel, Washington, D. C., for defendant Interstate Commerce Commission.

A. K. McIntyre, Erwin, Tenn., J. P. Fishwick, Roanoke, Va., R. B. Gwathmey, Wilmington, N. C., James W. Hoeland, Louisville, Ky., for railroad intervenors, defendants.

Before PARKER, Chief Judge, HAYNSWORTH, Circuit Judge, and WARLICK, District Judge.

HAYNSWORTH, *Circuit Judge*.

This action was commenced in the United States District Court for the Western District of North Carolina by the plaintiffs, components of the Southern Railway System, against the United States and the Interstate Commerce Commission to enjoin the enforcement of a decision and order of the Interstate Commerce Commission en-

tered on November 15, 1956, in a proceeding entitled "Carolina, Clinchfield and Ohio Railway v. Southern Railway Co., et al."

Pursuant to the requirements of § 2325 of Title 28 of the United States Code, a three-judge Court was convened in accordance with the provisions of § 2284 of Title 28 of the United States Code, and the case was heard in accordance with the requisite procedures therein set forth.

Upon motion Atlantic Coast Line Railroad Company, Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina, Georgia Railroad & Banking Company, Interstate Railroad Company, Louisville and Nashville Railroad Company, Norfolk and Western Railway Company, and Harlan County Coal Operators Association were permitted to intervene as parties defendant.

The controversy revolves around rates applicable to certain routes for fine coal moving from mines on the lines of the Interstate Railroad Company, the Louisville and Nashville and the Norfolk and Western in eastern Kentucky, eastern Tennessee and Southwestern Virginia to destinations on the lines of the Southern and its short line connections in North Carolina and South Carolina.

Prior to April 8, 1954, there were in effect joint rates on through routes to destinations on the lines of the Southern in the Carolinas which were applicable to all grades of coal. From mines in the Clinch Valley area on the lines of the Norfolk and Western coal could move over the lines of that railroad to St. Paul, Va.; thence by the Clinchfield to Marion, N. C., or Spartanburg, S. C., and the Southern beyond. Alternately it could move over the lines of the Norfolk and Western to Norton, Va.; thence via Interstate to Appalachia and the Southern, through Asheville, beyond.

From mines on the Interstate the coal could move to Miller Yard; thence via the Clinchfield to Marion, N. C., or

Spartanburg, S. C., and the Southern beyond, or, alternately, to Appalachia and the Southern, through Asheville, beyond.

From mines in the Harlan District on the Louisville and Nashville the coal could move to Dorchester Junction, Va.; thence by Interstate to Miller Yard; thence by Clinchfield to Marion, N. C., or Spartanburg, S. C., and the Southern beyond, or it could move westwardly by the Louisville & Nashville through Corbin, Ky. to Knoxville, Tenn., thence by Southern, through Asheville, beyond.

For destinations in the southern portions of South Carolina, coal originating on the L and N could move by a third alternate, over the lines of that railroad to Atlanta, thence the Georgia Railroad to Augusta, Ga., and the Southern beyond.

All of these were open, active routes, and fine coal, as well as other grades of coal, moved over the routes in which the Clinchfield and the Georgia Railroad were participants.

Because of increasing competition from natural gas, oil and other fuels the carriers involved proposed a voluntary reduction in the rate on fine coal amounting to 35¢ a ton. A like reduction was proposed upon coal originating in mines on the lines of the Chesapeake & Ohio moving by that railroad to Elkhorn City, Ky., and thence by the Clinchfield to Marion, N. C., or Spartanburg, S. C., and the Southern beyond.

The Southern agreed to the proposed reduction but restricted its agreement to those routes over which it got its longest haul. It thus participated in the reduction on the Clinchfield route for coal originating on the lines of the Chesapeake & Ohio, but declined to participate in the reduced rate on fine coal moving from mines on the Louisville and Nashville, the Interstate and the Norfolk and Western over routes in which the Clinchfield or the Georgia Railroad were participating carriers. Appropriate tariff

schedules were filed and the reduced rate on fine coal became effective on April 8, 1954, restricted, however, to those routes on which the Southern had its longest haul.

Because of the resulting rate differential of 35¢ a ton, shipments of fine coal were diverted from the Clinchfield and Georgia Railroad routes and thereafter the only shipments of fine coal moving over the higher rated routes appeared to have been the result of mistake or inadvertence of the shipper.

Coal in larger sizes, unaffected by the rate reduction on fine coal, continued to move over routes of the Clinchfield and the Georgia Railroad as theretofore.

On August 29, 1955, approximately seventeen months after the reduced rates on fine coal on the restricted routes became effective, the Louisville and Nashville, Norfolk and Western, Interstate, Clinchfield, Georgia Railroad and the Seaboard Air Line Railroad filed a complaint with the Interstate Commerce Commission, in which the Southern was made the defendant, for the establishment of reasonable joint rates upon the routes in which the Clinchfield and the Georgia Railroad were participating carriers. That proceeding resulted in the decision and order, enforcement of which the Southern now seeks to enjoin. In its order the Commission required the carriers involved to place into effect and maintain joint rates on fine coal from the mines of origin to destinations on the Southern, and its short line connecting carriers, in the Carolinas over routes in which the Clinchfield and the Georgia Railroad were participants at the same level as the previously published rates restricted to the routes in which the Southern had its longest haul.

The position of the Southern is that the voluntary reduction in the joint rate on fine coal restricted to those routes on which it had its longest haul, effectively closed the alternate routes to fine coal traffic and that those routes cannot be "reopened" for such traffic except pur-

suant to the provisions of § 15(4) of the Transportation Act of 1940 and upon the basis of full and complete findings in accordance with the standards of that Section. In effect, the position of the Southern is that the order of the Commission, would compel the creation or establishment of through routes which were nonexistent in August 1955.

With this position, we cannot agree.

The Southern with the other carriers concerned, many years ago, had established through routes and joint rates over the lines of the Clinchfield and the Georgia Railroad for all sizes of coal moving from mines on the L. & N. the Interstate and the Norfolk & Western, in the areas with which we are concerned, to destinations in the Carolinas on the lines of the Southern and its short line connections. The rates for such coal of all sizes had been fixed by the Commission in Carolina Coal Consumers Conference v. A. & RR Co., 270 I.C.C. 291, to which there had been added subsequently authorized general increases. There is no doubt that prior to April 8, 1954, the routes of the Clinchfield and the Georgia Railroad were open, active through routes over which fine coal actually was moving under joint rates at the same level as those applicable over alternate through routes.

The rate reduction effected on April 8, 1954, but restricted to those routes in which the Southern had its longest haul, did not close the previously existing through routes. It is quite true that shippers, ordinarily, would route fine coal over the lower rated routes rather than the higher rated routes, but though at a higher level, the joint rates over the routes of the Clinchfield and the Georgia Railroad applicable to all sizes of coal, including fine coal, remained in effect and uncancelled.

The Act provides a procedure by which a carrier may cancel a through route which is uneconomic or burdensome, but it carries the burden of proof in the hearings

that may be held upon its application. Through routes may also cease to exist because of abandonment or long neglect. Thus in Denver & Rio Grande Western R.R. Co. v. Union Pacific, 351 U.S. 321, the Court upheld the finding by an evenly divided Commission that routes were technically closed as through routes where it appeared that joint rates had been cancelled more than forty years previously and over which in the last forty years shipments could move only at much higher combination rates. The Court, however, considered the long lapse of time after the cancellation of joint rates as only one circumstance to be taken into account and its holding was only that upon the evidence the Commission was not compelled to find that the routes were still open as through routes.

Here there has been no formal cancellation of the joint rates much less of the through routes, and the time involved in comparison with the lapse of time in the Denver & Rio Grande Western case is negligible.

Through routes may be found to exist though no joint rate has ever been applicable to it. But the existence of a joint rate necessarily presupposes the existence of a through route. See United States v. Great Northern Railway Co., 343 U.S. 562.

These routes, including the Clinchfield and the Georgia Railroad as intermediate carriers, have been operated as joint routes for many years. Joint rates applicable to them had historically been at the level of the joint rates over competing routes. Shippers used them actively.

Nothing occurred on April 8, 1954, to change their character as through routes. The tariffs establishing joint rates over them remained in effect. The publication of lower rates over competing routes diverted traffic from them, but there has been no such acquiescence over an extended period of time as would imply an abandonment, by mutual agreement, of these routes as joint routes.

It would be anomalous, indeed, if a railroad, seeking the closure of a joint route, by establishing a lower rate on a competing route, could relieve itself of the burden of proof imposed upon it and transfer to the other participating carriers in the joint route the heavy burden of meeting the requirements of § 15(4) of the Act.

We conclude that there was abundant evidence to support the findings of the Commission that the Clinchfield & Georgia R.R. routes were through routes within the meaning of the Act and that the Commission could compel a reduction in the joint rates over those routes without reference to the requirements of § 15(4) of the Act. U. S. v. Great Northern Rwy. Co., 343 U.S. 562; Virginian Rwy. Co. v. U. S., 272 U.S. 658; Great Northern Rwy. v. U. S., (D. Del.) 81 F. Supp. 921, affd. 336 U.S. 933; Southern Rwy. Co. v. U. S. (E.D., Va. decided June 19, 1957)—— F. Supp.——.

That the Commission did so find is clear. Its references in its decision to these routes as "closed" was in a commerical sense only, for the Commission was emphasizing the diversion of traffic which naturally occurred as a result of the establishment of lower rates on competing routes.

The Southern also contends that even though the Commission was authorized to proceed under its rate making powers without regard to § 15(4), its action in reducing the assailed rates to the level of the joint rates voluntarily established over competing routes was unreasonable and arbitrary. However, the Commission had before it evidence that abundantly justified its finding.

The routes in which the Clinchfield and Georgia Railroad are participating carriers are shorter than alternate routes over which the lower rate applied. Car-mile revenue over these routes at the same rate is higher than over Southern's long haul routes. Southern's participation at the lower rate in fine coal shipments originating on the Chesapeake & Ohio and delivered to Southern by

the Clinchfield at Marion, N. C., or Spartanburg, S. C., while refusing to participate at the same rate in shipments over substantially the same route originated by the Louisville and Nashville, the Interstate or the Norfolk and Western was inconsistent and disruptive of long established group relationships. The assailed rates are too high to move traffic. It is clear that only by reducing the joint rates over these routes to the level of the rates over competing routes could these routes participate in the available traffic and only thereby could established relationships be restored.

We conclude that the action of the Commission was abundantly justified by the evidence before it and its findings based thereon. Board of Trade v. United States, 314 U.S. 534; Virginian Railway Co. v. U. S., 272 U.S. 658.

An appropriate order will be entered dismissing the complaint and denying the application for an injunction.

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INTERSTATE COMMERCE COMMISSION

No. 31863

AROLINA, CLINCHFIELD & OHIO RAILWAY ET AL. v. SOUTHERN RAILWAY COMPANY ET AL.

Decided November 15, 1956

int rates on fine coal, in carloads, from origin groups in eastern Kentucky and Tennessee, and southwestern Virginia, to destinations in North North Carolina and South Carolina, over specified routes, found unjust and unreasonable. Reasonable basis of rates prescribed.

M. T. Hastings, A. K. McIntyre, J. P. Fishwick, R. B. Gwathmey, nd *A. L. Holton* for complainants.

Henry J. Karison for defendants.

Roy Carson and *Osborn Lemmons* for interveners in support of mplainants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WINCHELL, AND MURPHY

Y DIVISION 2:

Exceptions to the report proposed by the examiner were filed by the efendants, and the complainants replied. Requested findings and xceptions not discussed in this report nor reflected in our findings or nclusions have been considered and found not justified.

By complaint filed on August 29, 1955, as amended, the complaining il carriers allege that the defendants have failed in their duty to oin in the maintenance of reasonable through rates on fine coal,[1] in rloads, from mines on the Interstate Railroad Company (hereinfter called the Interstate), the Louisville and Nashville Railroad ompany, and the Norfolk and Western Railway Company in eastern entucky, eastern Tennessee, and southwestern Virginia, to destinaons in North Carolina and South Carolina on the lines of the outhern Railway Company[2] and its connecting lines, named as deendants herein, over routes including the Carolina, Clinchfield and hio Railway (hereinafter called the Clinchfield) or the Georgia ailroad as intermediate carriers, in violation of section 1 (4) of the nterstate Commerce Act. It is also alleged that the refusal of the

[1] Fine coal is defined as that which will pass through a bar screen not exceeding ½ inches between bars, or its equivalent, a 3-inch mesh, or 3-inch round perforaon, and is commonly described as stoker, slack, steam nut, pea, or nut and slack al.

[2] Reference hereinafter to the Southern will be understood as including its connecons which are named defendants herein.

defendants to participate in reduced carload rates on fine coal from mines on the Louisville & Nashville, over routes which include either the Clinchfield or the Georgia Railroad as an intermediate carrier, denies to such carriers, operated under a common management or control, the right to their long haul, in violation of section 15 (4) of the act. In view of our conclusions herein, the latter allegation will not be further considered.

The Harlan County Coal Operators Association, composed of producers which ship coal from Kentucky to the Carolinas, and two dealers in South Carolina who purchase and receive coal from mines on the lines of the complainants, intervened in support of the complaint.

The Clinchfield interchanges traffic with the Southern at Marion, N. C., and Spartanburg, S. C., and the Georgia Railroad, at Augusta, Ga. Both the Clinchfield and the Georgia are leased jointly by the Louisville & Nashville and the Atlantic Coast Line Railroad Company.

On brief and in their exceptions, the defendants contend that the complaint does not show, nor does the evidence establish, that any legal interest of the complainants has been injuriously affected, and thus that the complaint should be dismissed forthwith. This contention cannot be sustained. The complaining carriers have a right to a determination of the lawfulness of the assailed joint through rates in which they participate and which they are unable to change without the concurrence of the defendants. Especially is such a determination called for here since shippers and consignees have intervened as parties to the proceeding.

The origins under consideration are the Harlan, Windrock, La Follette, and Jellico-Middlesboro groups in Kentucky and Tennessee, served by the Louisville & Nashville, mines in Virginia on the lines of the Interstate, and Clinch Valley group 2 in Virginia served by the Norfolk & Western. Joint rates apply on all sizes of coal from the named origin groups over the following routes: (1) To destinations in the Carolinas from the Harlan group, over the Louisville & Nashville to Dorchester Junction, Va., thence the Interstate to Miller Yard, Va., and the Clinchfield to Marion or Spartanburg, at either of which junctions interchange is made with the Southern for movement beyond; (2) to destinations in South Carolina east of Augusta, Ga., from the Harlan, Jellico-Middlesboro, La Follette, and Windrock groups, over the Louisville & Nashville to Atlanta, Ga., thence the Georgia Railroad to Augusta, and the Southern beyond; (3) to destinations in the Carolinas from mines on the Interstate, over that carrier to Miller Yard, thence the Clinchfield to Marion or Spartanburg and the Southern beyond; and (4) to destinations in the Carolinas from Clinch Valley group 2, over the Norfolk & Western to St. Paul,

Va., thence the Clinchfield to Marion or Spartanburg, and the Southern beyond.

On all sizes of coal, except fine coal, joint rates in the same amounts also apply over the following routes: (1) From the Harlan, Jellico-Middlesboro, La Follette, and Windrock groups, over the Louisville & Nashville to Knoxville, Tenn., and the Southern beyond; (2) from mines on the Interstate, over that carrier to Appalachia, Va., and the Southern beyond; and (3) from Clinch Valley group 2, over the Norfolk & Western to Norton, Va., thence the Interstate to Appalachia, and the Southern beyond. Prior to April 8, 1954, the same rates also applied on fine coal over the latter routes, but on that date such rates were reduced 35 cents per ton. As a consequence of the reduction, fine coal from the origin groups under consideration, except for a few shipments made by mistake, has not been moving over routes including the lines of the Clinchfield or the Georgia Railroad. Except for the reduced rates on fine coal, the rates referred to are on the level prescribed in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291, plus subsequently authorized general increases.

It is contended by the defendants that the routes including the Clinchfield or the Georgia are commercially closed, and that through rates on fine coal cannot be prescribed without contemporaneously prescribing through routes. A through route may be defined as an arrangement, express or implied, between connecting carriers by which they hold themselves out as offering through transportation service from a point on the line of one to a destination on the line of another. A joint rate is not essential to the existence of a thruogh route, but the establishment of joint rates presupposes through routes. As stated, joint rates are applicable on fine coal transported from the origin groups under consideration to destinations in the Carolinas, over routes which include the Clinchfield or the Georgia as intermediate carriers and the defendants as delivering carriers. It follows that the routes in question are through routes within the meaning of section 15 of the act. Nothing in that section imposes a restriction on our power to prescribe just and reasonable through rates over such routes.

The duty of carriers under section 1 of the act is twofold; namely, to establish reasonable through routes, and to publish just and reasonable rates applicable thereto. In other words, the requirement of the law is that traffic moving over established through routes shall be subject to just and reasonable through rates. The defendants have joined in the establishment of through routes embracing the Clinchfield or the Georgia, and it remains to be determined whether the joint rates on fine coal applying over such routes are just and reasonable.

All railroads participating in the handling of coal originating at mines in eastern Kentucky, eastern Tennessee, and Virginia joined

in the blanket reduction of 35 cents a ton on fine coal to all destinations in North Carolina and South Carolina, to meet the severe competition being encountered from other fuels, particularly natural gas and oil. The Southern, which serves none of the origin groups under consideration, declined to participate in reductions from those groups to destinations on the defendants' lines over routes including the Clinchfield and the Georgia. The urgency of the blanket reduction, and the necessity of maintaining relationships with other origin groups included in the adjustment, influenced the complainants to forego protesting the schedules which were published to effect the reductions. The complainants contend that the assailed joint through rates are unjust and unreasonable to the extent that they exceed the lower joint rates applicable over routes through Knoxville or Appalachia.

Routes from the Harlan group through Knoxville, over which the reduced rates on fine coal apply, are 64 and 94 miles longer to representative junctions of Spartanburg and Marion, respectively, than the routes through Miller Yard over which the assailed joint rates apply. To the same junctions, from mines on the Interstate, the lower rated routes via Appalachia are 6 and 37 miles longer than the routes via Miller Yard, and from Clinch Valley Group 2 they are 25 and 56 miles longer than the routes via St. Paul. The reduced rates also apply from the Harlan group over routes through Atlanta, with interchange at that point between the Louisville & Nashville, which originates the traffic, and the Southern. Over the latter routes the distance ranges as high as 268 miles longer to destinations in the Carolinas than over routes via Miller Yard at the assailed joint rates. The routes through Atlanta, as well as similar routes over which the reduced rates apply from the Jellico-Middlesboro, Windrock and La Follette groups, are longer to several destinations on the Southern in South Carolina than the higher rated routes which embrace the Georgia as an intermediate carrier between Atlanta and Augusta. For instance, to Allendale, S. C., the reduced rate applies over a route of 589 miles, whereas the higher assailed rate applies over a route of only 475 miles.

Car-mile revenue from the rates sought would be greater over routes including lines of the Georgia Railroad and the Clinchfield, because of the lesser mileages over such routes. For example, from the Harlan group the reduced rates, on a loading of 55 tons, yield from 49.2 to 54.7 cents a car-mile over routes via Knoxville, and from 34.9 to 47.2 cents a car-mile over routes via Atlanta, to 35 representative destinations in the Carolinas. Over routes through Miller Yard, the through rates sought to the same destinations would yield from 57.9 to 67 cents a car-mile.

Prescribed group relations of many years' standing have been isturbed, insofar as the higher rated routes are concerned, by the efusal of the defendants to join in reduced rates on fine coal over uch routes. By way of illustration, rates on fine coal from mines n the Big Sandy group in Kentucky, on the lines of The Chesaeake and Ohio Railway Company, were on the same prescribed asis as the assailed joint rates from the Harlan group until the eduction in April 1954. The defendants since that date have participated in the reduced rates from the Big Sandy group over routes f the Chesapeake & Ohio to Elkhorn City, Ky., thence the Clinchield through St. Paul and Miller Yard to Marion or Spartanburg, nd the Southern beyond to destinations in the Carolinas. However, fine coal moving from the Harlan group over the Louisville & Nashville and the Interstate to Miller Yard, thence the Clinchfield o Marion or Spartanburg and the Southern beyond to the same lestinations is subject to the assailed joint rates which are 35 cents per ton higher than those from the related Big Sandy group.

The evidence leaves no doubt that the assailed rates are too high o move fine coal from and to the points under consideration. The fact that the reduced joint rates from and to the same points were stablished for competitive reasons does not invalidate their use for comparative purposes since the competitive influence exerts equal force on all fine coal shipped from the same origins and marketed t the same destinations, however it might move. The existence of oint rates over reasonable through routes, such as those described hereinbefore, which move no traffic solely because they are higher han joint rates over other through routes, presents an anomalous ate structure. Where there is before us clear and convincing evidence that rates will produce more revenue if fixed at a lower rather han a higher level, we may take that fact into consideration in prescribing a maximum reasonable basis, for we are enjoined by the so-called rate-making rule of section 15a (2) of the act to give consideration to the "effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed."

Moreover, the defendants' action in concurring in a rate reduction over some routes and refusing to concur in the same reduction over other routes, when they had previously, and for a long period, participated in equal joint rates over all of the routes, closed to traffic the higher rated routes as effectively as if schedules had been established with that sole objective. In so doing, the defendants escaped the burden of proving that cancellation of the joint rates over through routes embracing the Clinchfield or the Georgia would be consistent with the public interest, without regard to the pro-